79-1617

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79- .....

STATE OF OKLAHOMA ex rel. DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

MRS. C. V. PILE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PRESTON L. PULLIAM
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Attorney for Petitioner

Dated: February 8, 1980

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
ARGUMENT	5
The Oklahoma Supreme Court erred in holding that non-commercial signs are not controlled by the Oklahoma Outdoor Advertising Control Act	5
CONCLUSION	8
APPENDIX A — Opinions of the Supreme Court of Oklahoma	A-1
APPENDIX B — Journal Entry of Judgment of the District Court of Harper County, Oklahoma	B-1

TABLE OF AUTHORITIES

Cases	PAGE
Berman v. Parker, 348 U.S. 26 (1954)	7
Bigelow v. Virginia, 421 U.S. 809 (1975)	4
Grayned v. City of Rockford, 408 U.S. 177 (1972)	6
Hague v. CIO, 307 U.S. 496 (1939)	5
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)	6
Lovell v. Griffin, 303 U.S. 444 (1938)	7
Markham Advertising Co. v. Washington, 439 P.2d 248 (1968)	6
Opinion of the Justices, 169 A.2d 762 (1961)	6
United Advertising Corp. v. Borough of Raritan, 93 A.2d 363 (1952)	6
Valentine v. Chrestensen, 316 U.S. 52 (1942)	4
Virgina State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748 (1976)	4
Washington v. Lotze, 593 P.2d 811 (1979)	4, 6, 7
Statutes	
23 U.S.C. § 131	2, 4
12 O.S. §1273(a)	5
69 O.S. 1971 §§ 1271-1285	2, 5
Constitutions	
U.S. Const., First Amendment	2
U.S. Const., Fourteenth Amendment	2
Okla. Const., Art. II, Sec. 22	2

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of Oklahoma, ex rel Department of Transportation of the State of Oklahoma, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma entered herein the above entitled case on November 13, 1979.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of the State of Oklahoma may be found at 603 P.2d 337 in Appendix A hereto, *infra.* The Journal Entry of Judgment of the District Court of Harper County, Oklahoma is printed in Appendix B hereto, *infra.*

JURISDICTION

The judgment of the Supreme Court was entered on November 13, 1979. The jurisdiction of the Supreme Court is invoked under 28 U.S.C.S. § 1257(3), § 1258(3).

QUESTION PRESENTED

The primary question presented for consideration is whether the Oklahoma Outdoor Advertising Control Act (69 O.S. 1971 §§ 1271-1285) violates the First Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

(1) 69 O.S. 1971 §§ 1271-1285.

(2) 23 U.S.C. § 131.

(3) Article II, § 22 of the Constitution of the State of Oklahoma.

(4) First amendment to the Constitution of the United States.

(5) The Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF CASE

In accordance with the law and regulations, Mrs. C. V. Pile applied for registration of her billboard on April 30, 1973. Mrs. Pile admitted that the billboard was erected in October of 1972 in an area where no zoning existed. In response to her assertions, the Department of Transportation issued a ninety (90) day notice to remove the billboard for the reason that the sign was erected after the

effective date of the Outdoor Advertising Control Act in an area where billboards are prohibited. Mrs. Pile refused to remove her billboard and injunctive proceedings to compel removal were instituted. By way of demurrer, Mrs. Pile asserted that her billboard was outside the scope of the law because of the "non-commercial" message the sign conveyed. In addition, she averred that if the law did apply to signs advertising "non-commercial" messages, then the law is unconstitutional as violative of the First and Fourteenth Amendments to the United States Constitution.

On the 20th day of September 1977, the Judge of the District Court of Harper County sustained the demurrer and stated that "as this statute would be applied to this particular defendant and this particular sign, that it would be an infringement upon the First Amendment rights of the defendant to express herself on political issues." Thereafter, the Oklahoma Department of Transportation timely commenced proceedings on appeal to the Supreme Court of Oklahoma.

The Supreme Court of the State of Oklahoma affirmed the decision of the District Court on November 13, 1979 by holding that non-commercial speech is not regulated by the Oklahoma Outdoor Advertising Control Act.

REASONS FOR GRANTING THE WRIT

In affirming the demurrer of the District Court of Harper County, Oklahoma, the Supreme Court of the State of Oklahoma erred as matter of law and said decision is contrary to the laws of the United States. Specifically, the court below ignored the decisions of the Supreme Court of the United States as enumerated in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748 (1976) and *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). These decisions have greatly eroded the commercial speech vs. non-commercial speech dichotomy as first enumerated in *Valentine* v. *Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, (1942).

In addition the Supreme Court of the State of Washington has ruled in *Washington* v. *Lotze,* 593 P.2d 811 (1979), that a so-called free speech sign was subject to the Washington Outdoor Advertising Control Act. The Billboard legislation in Oklahoma and Washington are similar for the reason that both acts were patterned after the federal law, 23 U.S.C. § 131. Therefore, there exists conflicting decisions of two state supreme courts within which the facts presented and laws applied are practically identical.

ARGUMENT

THE OKLAHOMA SUPREME COURT ERRED IN HOLDING THAT NON-COMMERCIAL SIGNS ARE NOT CONTROLLED BY THE OKLAHOMA OUTDOOR ADVERTISING CONTROL ACT.

In its opinion below, the Oklahoma Supreme Court held that it was bound to accept an interpretation of the Oklahoma Outdoor Advertising Control Act (69 O.S. § 1271 *et seq.*) which would render the Act constitutional. To reach this conclusion, the court reasoned that the Act applied only to commercial signs and non-commercial signs were not to be regulated by the Act (603 P.2d at 343).

To justify this rationale, the court proceeded to define advertising as commercial advertising (*Id* at 339) in spite of the definition found at 12 O.S. § 1273(a) which states, " 'Sign, Outdoor Advertising' or 'Outdoor Advertising Device' shall mean any outdoor sign, display, device, notice, figure, painting, drawing, message, placard, poster billboard or other thing, which is designed, intended or used to advertise or inform. . . ." (emphasis added).

The court below restricted the scope of the police power by declaring that Interstate and Federal-Aid Primary Highway Systems are free-speech forums without citing a single case in support of this assertion. The court borrowed the free-speech forum language regarding streets and parks found in *Hague* v. *CIO* (307 U.S. at 515; 59 S.Ct. at 964) and concludes that highways are the equivalent in this day to the streets of a former time (603 P.2d at 341). It must be noted that the essential function of a highway is to provide a safe and hopefully pleasant route for travel

and not to provide a gallery for billboards which would interfere with this essential function. *Grayned* v. *City of Rockford* (408 U.S. 116; 92 S.Ct. at 2303), elaborates on function by stating that "the nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable . . ." The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Justice Douglas, speaking in *Lehman* v. *City of Shaker Heights* (418 U.S. at 306; 94 S.Ct. at 2718), stated "a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, any more than is a highway." The Petitioner submits that heavily traveled highways are not to be considered as free-speech forums.

Billboard control legislation historically has been justified under the police power as protecting the health and safety of the traveling public. The Oklahoma Supreme Court dismissed billboard control arguments as not bearing a reasonable relationship to public safety, thereby ignoring the safety arguments found in two billboard control decisions, namely *Markham Advertising Co.* v. *Washington* (439 P.2d at 255) and *Washington* v. *Lotze,* (593 P.2d at 815). The court below noted that on-premise signs are allowed in rural areas but other signs were controlled and by so doing failed to consider that on-premise signs have long been treated differently from off-premise signs *(Opinion of the Justices,* 169 A.2d 762; *United Advertising Corp.* v. *Borough of Raritan,* 93 A.2d 363).

The court below addressed the aesthetic components of the police power by quoting *Lovell* v. *Griffin* (303 U.S. 444) a 1938 free-speech forum case, which decided that a state may not deny the use of a public forum to promote clean streets. However a 1954 case deciding the validity of urban renewal legislation *(Berman* v. *Parker,* 348 U.S. 26) state "the concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy."

Since the Oklahoma Supreme Court believed that no compelling State interest existed to control the location of billboards with "free-speech" content, it refused to balance the interest for regulation against First Amendment Rights.

Essentially, the court below is proposing that under the guise of free speech, no regulation is possible. Freedom of speech means freedom from regulation. This position is inconsistent with *Washington* v. *Lotze* (*supra*) which balanced the public interest advanced by the billboard regulations against First Amendment Rights and concluded free speech restrictions were incidental (*Id.* at 814). The Act is genuinely concerned with the geographic location of signs in order to promote the compelling State interest in safety and aesthetics which are unrelated to message content. Contrary to the assertions of the court below, the restrictions on billboards are consistent with other time, manner and place controls which have been held valid.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

PRESTON L. PULLIAM
Chief of the Legal Division
Oklahoma Department of
Transportation

Attorney for Petitioner

Dated: February 8, 1980

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Filed Nov. 13, 1979]

STATE OF OKLAHOMA ex rel. DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA, Appellant,	)	No. 51,541
v.	)	
MRS. C. V. PILE, Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF HARPER COUNTY, STATE OF OKLAHOMA
THE HONORABLE FRANK OGDEN, DISTRICT JUDGE

The State of Oklahoma appeals the sustension of a demurrer to a petition, alleging the trial court erred in holding the relief sought on the face of the petition, pursuant to 69 O.S. 1971 § 1271, et seq. contravened the Constitutional guarantee of freedom of speech under the facts of this case. The trial court's sustension and dismissal are affirmed for reasons discussed.

AFFIRMED

Preton L. Pulliam Oklahoma City, Oklahoma	For Appellant.
Bradford S. Baker Farmer, Woolsey, Tips & Gibson Tulsa, Oklahoma	For Appellee.
Phillip K. Jones Norman L. Sisson, and Jonathan C. Harris of Counsel Baton Rouge, Louisiana	For Department of Transportation and Development, State of Louisiana, Amicus Curiae

HARGRAVE, J.

Before this court in this proceeding is an appeal brought by the State of Oklahoma from a judgment of the District Court of Harper County sustaining a demurrer to the state's petition for an injunction to compel the removal of a billboard from the vicinity of S21, T25N, R24W in Harper County under the authority of 69 O.S. 1971, §§ 1271-1275. The state's petition in error raises a single question and that is: Did the trial court err as a matter of law in holding the relief requested by the state's petition violated the first amendment to the Constitutition of the United States?

In the petition filed by the State ex rel Department of Highways and subsequently held vulnerable to a demurrer for failure to state facts sufficient to constitute a cause of action, the state alleged that it is charged with the duty of enforcing the size, number, lighting and type of outdoor advertising signs on Federal-aid Primary Highway Systems under the authority of 69 O.S. 1971 §§ 1271-1285. Further, the state alleged that the defendant, Mrs. C. V. Pile, owns and is displaying, as an individual, a sign located within 660 feet from the nearest edge of Federal Highway U.S. 270 which was erected after March 28, 1972, constituting a public nuisance. Physically attached to the petition is a copy of the letter the petition alleges was mailed to Mrs. Pile more than 90 days prior to the filing of the action. This letter states that on its face the sign conveyed the following message:

"GET US OUT OF THE UNITED NATIONS"

The defendant demurred, stating specifically that . . . "the statutory authority on which plaintiff's cause is based does not apply to defendant's noncommercial sign . . .".

As a primary indicia of the coverage of the Act, the definition of outdoor advertising device is found in 69 O.S. 1971 § 1273 (a), and provides:

> (a) "Sign", "outdoor advertising" or "outdoor advertising device" shall mean any outdoor sign, display, device, notice, figure, painting, drawing, message, placard, poster, billboard or other thing which is designed, intended, or used to advertise or inform, but shall not include surface markers showing the location or route of underground utility facilities or pipelines or public telephone coin stations installed for emergency use.

The definition given in Webster's Third New International Dictionary contains three primary senses for the word "advertising":

1. The action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public, esp. by means of printed or broadcast paid announcements.
2. Advertising [a magazine containing a great deal of advertisements] [the advertising pages of the Sunday paper].
3. The business or profession of designing and preparing advertisements for publication or broadcast . . .

The definitions clearly refer to what is generally thought of as commercial advertising.

This State's Constitution also contains a guarantee of the continued freedom of the right to speak and publish upon issues of the day in Article 2 § 22 of the Consittution of the State of Oklahoma, wherein it is provided:

> Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or the press. . . .

Mindful of the federal guarantee to the people of this right to speak and to be heard[1] in addition to the guarantee of that right in the preceding excerpt from this State's Constitution, the trial court determined implicitly by his sustention of the defendant's demurrer that if the act did restrict the pure speech activity pleaded in the state's petition, the act would be of doubtful constitutional validity. The court's ruling additionally presupposes that the act, 69 O.S. 1971 §§ 1271, et seq., is susceptible to a fair construction that pure speech activity is not restricted by the act. As was the trial court's duty in construing this statute and its restriction on speech activity, that lower court construed the act narrowly to avoid serious doubt as to its constitutionality, *U.S.* v. *Harriss*, 347 U.S. 612 (1954), and held from the bench:

> "It is this Court's opinion, gentlemen, if this statute were to be applied to this particular defendant and this particular sign that it would be an infringement upon the first amendment rights of the defendant to express herself on political issues."

The state has fashioned what amounts to a prohibition against written communication upon the rural byways of Oklahoma. The prohibition runs to all federally funded and interstate highways in rural areas. It cannot be said this restriction is not a substantial and material limitation on the physical ability of the citizens of this state to effectively communicate their sentiments to one another. The ban includes all the more heavily traveled roadways in rural areas of the state except the smaller and less traveled state highways and secondary, or section-line roads in the state. A large percentage of the mileage of this last class of

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[1] Protection afforded by the 1st Amendment to the United States Constitution extends to the recipient's right to acquire information as well as the speaker's right to disseminate that information. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).

roadways is dirt or gravel surfaced—not paved. Against this intrusion upon the ability of both the communicator and his audience to engage in a silent dialogue on the issues of the day, the State of Oklahoma refers us to its police power. Pursuant to the police power the state tells us it has the duty to protect the aesthetic integrity of Oklahoma's admittedly scenic countryside for the benefit of all. The state also justifies this abridgment of the ability to communicate on the theory that the presence of such billboards as that before the court constitutes a distraction to the motoring public, thus constituting a threat to public safety. Does the state's police power extend far enough to restrict the individual's freedom of speech under these circumstances? The determination of that question begins with the observation that the usual presumption favoring the constitutional validity of legislation generally is not operative against statutory restriction of the pre-eminent freedoms secured by the first amendment. That priority gives these liberties a sanctity and a sanction not permitting dubuious intrusions. It has been stated by the Federal Supreme Court therefore that any system of prior restraints of expression comes to the bar for judicial review bearing a heavy presumption against its constitutional validity. *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963); *Wear* v. *State of Minnesota ex rel Olson,* 283 U.S. 697 (1931); *Lovell* v. *City of Griffin,* 303 U.S. 444 (1938); *Schneider* v. *State of New Jersey,* 308 U.S. 147 (1939); *Cantwell* v. *State of Connecticut,* 310 U.S. 296 (1940); *Niemotko* v. *State of Maryland,* 340 U.S. 268 (1951); *Kunz* v. *People of State of New York,* 340 U.S. 290 (1951); *Staub* v. *City of Baxley,* 355 U.S. 313 (1958). Accordingly, any attempt to restrict these first amendment liberties must be justified by a clear public interest clearly and presently threatened by the activity sought to be regulated. The freedoms of speech and of press, of assembly and worship, may only be encroached upon after it is shown the restriction is necessary to prevent a grave and immediate danger to interests the state may lawfully protect. *West*

Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943). These rights rest on firmer ground than, for instance, due process, which mandates a rational connection between the remedy provided legislatively and the evil to be forestalled. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at an appropriate time and place, must have clear support in public danger. Only the gravest of abuses engendering paramount interests give occasion for limiting legislation. It is therefore our tradition to allow the widest latitude for discussion and the narrowest range for its restriction. *Thomas* v. *Collins*, 323 U.S. 516 (1945), at 530. This court has stated that in order for prior restraints to withstand constitutional attack they must be narrowly drafted so as to suppress only that speech presenting a clear and present danger of serious and substantial evil. *Hennessey* v. *Independent School District No. 4 Lincoln County*, 552 P.2d 1141 (1976).

As previously noted herein, reasonable time, place and manner restrictions are allowed under the police power in proper circumstances. Regulation of the time, place and manner of public forum utilization is compatible with the recognition of public forum rights, but may not be drawn so as to be in fact a prohibition upon use of that forum. *Hague* v. *C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed 1423 (1939). The existence of a public forum right clearly extends to streets and parks. *Schneider* v. *State of New Jersey, supra. Hague* v. *C.I.O., supra,* at p. 515, contains the following passage concerning the use of streets as a public forum:

> . . . Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times been a part of the privileges, immunities, rights and liberties of citizens.

After quoting the above passage with approval, the U.S. Supreme Court, in *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), stated that the right to the use of a public place for expressive activity may be restricted only for weighty reasons. Clearly the content of the message does not create the power to restrict the activity[2] but it is equally clear that reasonable time, place and manner restrictions may be necessary to further significant governmental interests. The nature of the place and the pattern of its normal activities dictate the kind of regulations of time, place and manner that are reasonable. *Grayned, supra.* As the mode of expression moves from print to action the scope of permissible state regulation significantly increases. The state may at times proscribe expression when it consists of conduct or action directed at the accomplishment of an end the state has validly declared illegal. *California* v. *LaRue,* 409 U.S. 109 (1972). But pure speech such as leafleteering and silent protest seem protected on all public forums. *Tinker* v. *Des Moines,* 393 U.S. 503 (1969), *Talley* v. *California,* 362 U.S. 60 (1960), *Lovell* v. *Griffin, supra.* Additionally, as implied by the statement that pure speech is protected in *all* public forums, it is true that one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place, *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974), *Schneider* v. *State of New Jersey, supra,* for as Justice Black stated in his concurring opinion in *NLRB* v. *Fruit Packers Local 760,* 377 U.S. 58 (1964), at p. 80: "First Amendment rights can no more validly be taken away by degrees than by one fell swoop."

From the above dialogue we have concluded that the highway, as the equivalent in this day of the streets of a former time, is an appropriate public forum for the dissemination of speech activity. The prohibition attempted

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[2] See *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92 (1972).

in this act affects a substantial portion of the available forum, to wit: all rural locales. Are the restrictions therein contained reasonable as to time, place and manner? The scope of the permissible regulation is narrow in this instance inasmuch as we are dealing with written communication, not actions or symbolic speech as noted above. See also *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

The justification urged by the state for the sweeping restriction of billboards from non-zoned or rural areas deals with safety and aesthetics. The state urges us under the authority of *Berman* v. *Parkes*, 348 U.S. 26 (1954), to recognize the public utility of this legislation as a valid exercise of the police power designed to promote the general welfare of the state and its citizens by preserving the natural scenic beauty of the state and encouraging tourism, etc. That the State, under the police power, may "determine the community should be beautiful as well as healthy" is not denied as a general statement. It is, however, in appropriate, and under the case law discussed herein impermissible, to interfere with a first amendment right to openly discuss the issues of the day to accomplish that end. The power of the state to infringe upon these first amendment rights on behalf of the physical beauty of the community has been denied heretofore. In *Lovell* v. *Griffin*, 303 U.S. 444 (1938), it was stated that the state may not deny the use of a public forum on the basis of a regulation designed to prohibit littering the streets as a result of the distribution of handbills. Such a decision is mandated by the fact that aesthetic standards are indeterminate, incapable of concrete definition, fluid and ever-changing, while the freedoms guaranteed by the first amendment are as absolute as the nature of a republic will allow. As a paramount consideration in this form of government, freedom of speech cannot be made subservient to any definition of beauty or aesthetics.

The second consideration the state raises in support of the challenged legislation is the health and safety of the

motoring public. It cannot be denied that furtherance of health and safety of its citizens is a valid basis for the exercise of a state's police power. As noted above in *Thomas* v. *Collins, supra,* this attempt to restrict this liberty must be justified by a clear public interest which is taken here to be the physical safety of our citizens. This public interest must be threatened by the proscribed speech not doubtfully or remotely, but must be imperiled by a clear and present danger requiring such intrusion. It is the duty of this court to determine whether or not the legislative action bears a reasonable relationship to the achievement of this governmental purpose. *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960). For reasons given hereafter we determine that it does not.[3] First, the statute does not restrict itself to the removal of billboards which impede the clear view of the roadway but applies to all signs in rural areas, except on-premises business signs. Second, not even all signs in rural locales are prohibited as would be necessary if billboards in general constituted an immediate threat or distraction. Thirdly, on-premises business signs are permitted in both rural and urban settings further limiting

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[3] We have examined the authority cited by the appellant in its amended brief, *State of Washington* v. *Lotze,* 593 P.2d 811 (1979), and find it not to be persuasive, although we accede to the statement made therein that statutory restraints upon the freedoms guaranteed by the first amendment of the Federal Constitution bear a heavy presumption against their constitutionality. However, we cannot hold the prohibition imposed by our act is an incidental restriction on these freedoms. The act substantially encroaches upon the use of a recognized public forum, the streets. The existence of an alternate forum is not material to the question. Additionally, the notion that aesthetic principles, however they are defined, constitute a compelling state interest which would justify a restriction on freedoms constitutionally guaranteed is rejected. Lastly, the manner and place restrictions imposed are not narrowly drawn to restrict only those written communications posing a clear and present danger to the motorist, and in fact are drawn to allow such activity in the cities, not in the rural areas, a result squarely contrary to that dictated by the consideration of the reduction of traffic distractions at the more dangerous poins of our highway system.

the effectiveness of the statute if it is actually designed to reduce driver distractions. Lastly, the statute reduces billboards in quiet rural settings to the point of extinction and at the same time leaves the number of billboards and their type largely unregulated in the highly congested metropolitan areas of the state.

Finally, the considerations of public safety and beauty as proffered by the state as a basis for prohibiting the speech signified by the defendant's billboard are mutually inconsistent. The argument is made that our residents are entitled to look at the beauty of the countryside, untrammeled by the blight of billboards, in the face of the statement that billboards can be banned because they constitute a distraction to the drivers of automobiles. Using this reasoning, one could argue the countryside should be covered with billboards to reduce the temptation to avert one's eyes from the road.

It can only be concluded that the roadways constitute a public forum utilized customarily for communication which may be restricted only narrowly to avert a clear and present danger. The manner and place restrictions imposed upon this speech activity have little if any relationship to the legitimate governmental purpose to be served by the legislation. If the statutory definition of sign, outdoor advertising, or outdoor advertising device found in 69 O.S. § 1273(a) including ". . . , or [any] other thing, which is designed, intended or used to advertise or *inform* . . ." was held to cover non-commercial speech, that interpretation would raise, at least, serious doubts as to its constitutionality. The statute is easily susceptible to the interpretation that it does not cover non-commercial speech. This court is bound to accept an interpretation that avoids constitutional doubt as to the validity of the provision. *U. S.* v. *Harriss,* 347 U.S. 612 (1954). The trial court has held the non-commercial speech not to be regulated by this statute, has avoided the spectre of unconstitutionality, and its decision is in all respects AFFIRMED.

LAVENDER, C.J., IRVIN, V.C.J., WILLIAMS, J., HODGES, J., SIMMS, J., OPALA, J., concur. DOOLIN, J., concurs in part, dissents in part. BARNES, J., dissents.

DOOLIN, J.: SPECIALLY CONCURRING IN PART: DISSENTING IN PART:

Specific control of highway advertising became the law and policy of this state in 1968, 69 O.S. 1971, § 1271 et seq. The state action was in response to acts of the United States Congress specifically 23 USC 131 (Federal Act), which under section (a) thereof sets policy and declares that outdoor advertising signs, displays and devices in areas adjacent to the Interstate and the Primary system of roads shall be controlled in order to protect the public investment of such highways to promote the safety and recreational value of public travel and to preserve natural beauty.[1]

The majority opinion affirms the action of the trial court in sustaining the demurrer to state's petition on three grounds: 1) 69 O.S. 1971 § 1271 et seq. was never intended to apply to first amendment rights guaranteed by the United States Constitution; 2) § 1271 et seq. abridges first amendment rights if it attempts to regulate freedom of expression; 3) § 1271 et seq. is constitutional except under the facts and circumstances of this case.

The trial court held the state was not entitled to relief upon its petition in as much as the relief sought (injunction) "would be an infringement upon the first amendment rights of defendant to express herself on a political issue."

At the risk of oversimplification, the Federal Act among other things created a system of controlled advertising along

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[1] 69 O.S. 1971 § 1271 et seq.; the statutory history of 23 USC 131 may be found following 23 USCA 131 and 23 USCS 131. As to the regulatory history, see 23 C.F.R., Highways, as amended.

the Interstate and Primary highway system. It authorized the Secretary to promulgate national standards of compliance. Under both State Act and the Federal Act, the sign that we deal with in this case stands in a prohibited status within 660 feet of the right of way of U.S. 270 running through Harper County, Oklahoma. U.S. 270 is a part of the Primary road system.

After the passage of the Federal Act, the various states including Oklahoma, enacted Highway Advertising Control Acts.[2]

I have no quarrel with the majority's opinion academically when it differentiates between commercial advertising and the political "advertising" or opinion under the first amendment of the United States Constitution and Art. II, § 22 of the Oklahoma Constitution. Neither do I balk in principle at the majority's requirements and conclusions as to a clear and present danger being necessary before first amendment rights may be abridged or limited. Likewise, I find no objection to the majority's conclusion as to streets and the right to use same as a place of assembly as guaranteed by the first amendment.

There are at least two vices or misconceptions as to the conclusion of the majority.

First, the majority overlooks those cases that hold first amendment rights of assembly and speech may be limited by a time, place and manner limitation albeit that such cases usually apply to commercial advertising. Such limitations might apply to the defendant in this case, for she is most free to opine or advocate beyond the 660 foot limit of the acts. Secondly, the majority affirms the trial court's denial that a state could ever, under the police power,

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[2] Oklahoma's Highway Advertising Control Act of 1965 has been at least twice amended, 69 O.S. Supp. 1972 § 1271 and 69 O.S. Supp. 1978 § 1272 et seq.

state a cause of action under the limitation of time, place and manner.[3]

Certainly a citizen may use the streets, parks and his own premises adjacent thereto as a means of communicating his thoughts and to assemble peaceably. But, I suggest his right is not absolute; it must be exercised in subordination to the general comfort and convenience of all. His rights must not, in the guise of regulation, be totally abridged or subverted.[4]

A valid exercise of the police power in regulating public streets as to loud and raucous noise does not deny freedom of speech but regulates it as to place, time and manner.[5]

Both the Federal Act and State Act are limitations on place and manner of communication or advertising within the "time, place and manner of speech" regulation discussed with approval by the United States Supreme Court most recently in *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 93, 97 S.Ct. 1614, 52 L.Ed.2d 155, 162 (1977); *Virgina State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976).

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[3] This case was decided on a demurrer to petition. We are therefore limited to the pleadings and a transcript of the court's oral findings. From the latter we know the state refused to amend its petition and elected to stand on it. Our examination of these limited sources might entitle us to remand under the time honored theory that a demurrer admits all facts pled and all logical conclusions to be drawn therefrom. Thus this court might find an abuse of discretion on the part of the trial court and could direct a hearing. I discard this action, for neither party advances such an argument and sooner or later, this court would be faced with the merits of a free speech issue.

[4] *Hague* v. *C.I.O.,* 307 U.S. 496, 516, 59 S.Ct. 954, 964, 84 L.Ed. 1423, 1437 (1939).

[5] *Kovacs* v. *Cooper,* 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). Various hypothetical cases and situations may be assumed which would illustrate this point.

Such limitations on opinion or private expression exist as to loud and raucous noises,[6] class room discussions which would disrupt discipline;[7] see also the filthy word case, *Federal Communications Commission* v. *Pacifica Foundation*, ____ U.S. ____, 98 S.Ct. 3026, ____ L.Ed.2d ____ (1978). *Curtis Publishing Company* v. *Butts* and *Walker* v. *Associated Press*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 points up the limitation that libel actions place on First Amendment rights:

> "The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others."
>
> * * * *
>
> "The guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . .' "[8]

The Acts attempt to place a limitation on the First Amendment as to place and manner based upon the police power. Both Acts recite or imply that the limitation is imposed because of the compelling interest of the State in preserving aesthetic qualities of roadways and the promotion of safety of motorists and the traveling public.[9]

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[6] See footnote 5, supra.

[7] *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). C.f. *In re: Primus*, ____ U.S. ____, 98 S.Ct. 1893, ____ L.Ed.2d ____ (1973).

[8] Per Mr. Justice Harlan with three Justices concurring and the Chief Justice concurring in result.

[9] *State* v. *Lotze*, 593 P.2d 811, 814 (Wash. 1979). Notice of Appeal to United States Supreme Court filed August 30, 1979.

In my opinion the State has pled and stated a cause of action for the reasons stated aforesaid, and the cause should be remanded for trial.

I do not indicate nor suggest the State is entitled to judgment on its pleadings. Its burden remains to show a clear and present danger and looms large. The existence of the Acts heretofore described is no evidence in itself of a valid exercise of police power; it remains suspect in the face of the Constitutions.

I would remand, for an evidentiary hearing would allow us to test or weigh evidence of the existence of a compelling public interest under the police power.

BARNES, J., DISSENTING:

I respectfully dissent from the majority opinion.

In the case before us, the Department of Transportation, in seeking an injunction against Appellee, has alleged that Appellee is maintaining a billboard within 660 feet of a highway covered by 69 O.S. 1971, §§ 1271-1275. The maintenance of Appellee's sign is, as plead, a violation of the 660-foot restriction contained in our statutes. On the basis of this maintenance contrary to law, the State seeks an injunction. The trial court held that such did not state a cause of action, implicitly ruling that to interpret the statute to include Appellee's billboard would be unconstitutional as a deprivation of free speech. The majority, in affirming the trial court's sustaining of the demurrer, has implicitly ruled that the imposition of such a restriction is not justified by the presence of a significant State interest. Yet, it is the sustaining of the demurrer which deprives the Department of Transportation of the opportunity to present evidence showing that the restrictions serve a significant governmental interest, and that the restrictions leave open ample alternative channels for communication of Appellee's message.

In *Virgina State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed. 2d 346, 363 (1976), the United States Supreme Court, in considering the constitutionality of restrictions upon advertising by pharmacists, stated:

> "We have often approved restrictions of that kind [time, place, and manner restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." [Bracketed information added.]

The Department of Transportation argues that the restrictions in our statutory scheme are justified by two significant governmental interests, public safety and scenic beauty.

In *Marham Advertising Co.* v. *State,* Wash., 439 P.2d 248 (1968), the Supreme Court of the State of Washington upheld the constitutionality of that State's billboard control act. At page 235 of that decision, the Court quoted with approval the finding of fact of the trial court, which included the finding that the defendants had introduced sufficient evidence to permit reasonable men to find that a reasonable relationship existed between outdoor advertising and traffic safety. In so ruling, the trial court stated:

> "* * * The evidence indicates that (a) outdoor advertising structures along the highways are intended to, and do, cause inattention to the driving task which, in turn, results in increased stopping distances and driver reaction times. Such factors contribute to traffic accidents; . . .(c) advertising signs compete with official highway signs for driver attention, and decrease the effectiveness of cautionary and directional messages essential for the safety of the traveling public; (d) highway billboards, which cause driver in-

attention, are contrary to the principles of modern interstate highway design, since highways are being built to permit higher speeds and increased traffic loads, thus placing greater demands on motorists' attention and alertness; . . .

"2. Signs located more than 660 feet from the highways are less obtrusive and are less likely to constitute a traffic safety hazard than signs located closer to the right-of-way.

"3. * * *

"4. Roadside advertising in scenic areas is detrimental to the appearance of these areas and is inconsistent with the purpose for which these areas were established."

In affirming the action of the trial court, the Washington State Supreme Court stated:

"* * * It is, in our opinion, within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed on the Commonwealth by nature in conjunction with the promotion of safety of travel on the public ways. . . ."

Indeed, the United States Supreme Court has recognized that aesthetic considerations do come within the scope of public welfare, and therefore may form the basis for the exercise of a sovereign's police power. In *Berman* v. *Parker,* 348 U.S. 26, 33, 72 S.Ct. 98, 102, 99 L.Ed. 27, 38 (1954), the United States Supreme Court stated:

"* * * The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." [Citations omited.]

More recently in *State* v. *Lotze*, Wash., 593 P.2d 811, 815 (1979), the Washington Supreme Court again found ample justification for restrictions similar to those before us. In so finding, the Washington Court stated:

> "We conclude that RCW 47.42 [the Washington statute being interpreted] as applied to appellants' billboards does not violate their First Amendment rights of free speech. The traffic safety rationale upheld in *Markham Advertising Co.* v. *State, supra*, and not refuted at trial in these cases is sufficiently compelling to outweigh the minimal retraint on appellants. The statutory scheme represents a reasonable place and manner limitation on speech leaving ample alternative channels of communication for appellants. Appellants' speech is not in any way being controlled as to content; its stricture is narrowly confined to place and manner. The entire panoply of means to communicate their views is open to appellants except for the limited restrictions of RCW 47.42."

In sustaining the demurrer to the petition, the trial court by implication held that the place restrictions imposed by the statutes were not applicable to Appellee. The majority opinion, in affirming this holding, reasoned that the place restrictions could not be interpreted as being applicable to Appellee, as such a construction would render the statute unconstitutional. The majority's conclusion is based upon the assumption that the place restrictions, if imposed upon the Appellee, could not be justified, as such restrictions could not serve a significant governmental interest, and did not leave ample alternative avenues of communication open to Appellee. Since I believe it is at least possible for such restrictions to be justified, I would not have affirmed the sustaining of the demurrer based upon the assumption that the 660-foot place restriction was incapable of being justified. Accordingly, I must dissent from the majority opinion.

APPENDIX B

IN THE DISTRICT COURT, IN AND FOR
HARPER COUNTY, STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel Department of Highways of the State of Oklahoma, Plaintiff,	)	No. C-76-51
vs	)	
MRS. C. V. PILE, Defendant.	)	

ORDER SUSTAINING DEFENDANT'S DEMURRER

Now on this 20th day of September, 1977, defendant's demurrer comes on to be heard, plaintiff appearing by its attorney, Preston L. Pulliam and defendant appearing by her attorney, Bradford S. Baker.

The Court finds that defendant's demurrer to the petition of the plaintiff herein on the grounds that said petition does not state facts sufficient to constitute a cause of action should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendant's demurrer to the petition of the plaintiff herein be and hereby is sustained.

FRANK OGDEN, Judge

(s) *Preston L. Pulliam*
PRESTON L. PULLIAM
Attorney, Legal Division
State of Oklahoma, ex rel
Department of Transportation
of the State of Oklahoma

BRADFORD S. BAKER
FARMER, WOOLSEY, TIPS & GIBSON
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Supreme Court, U.S.
FILED
MAY 12 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1617

STATE OF OKLAHOMA ex rel. DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

MRS. C. V. PILE,
Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRADFORD S. BAKER
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Attorney for Respondent

Dated: May 1, 1980

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-1617

STATE OF OKLAHOMA ex rel DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA, Petitioner

v.

MRS. C.V. PILE, Respondent

RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Mrs. C.V. Pile, respondent herein, prays that Petitioners Petition for a Writ of Certiorari be denied.

OPINION BELOW

State ex rel. Department of Transportation vs. Pile, 603 P. 2d 337 (Okl., 1979).

STATEMENT OF CASE

Mrs. Pile's demurrer below asserted that her "noncommerical" billboard message was not covered by the state statute because if it were, the statute would be unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article II Section 22 of the Constitution of the State of Oklahoma.

QUESTION PRESENTED

The primary question for consideration is whether or not the Oklahoma Outdoor Advertising Control Act (69 O.S. § 1271-1285) violates the Constitution of the United States if applied to Mrs. Pile's "non-commercial" billboard.

ARGUMENT FOR DENYING PETITION FOR A WRIT OF CERTIORARI

I.

Petitioner invokes jurisdiction of the Supreme Court under 28 U.S.C.§1257(3).

However, respondent argued below and the Oklahoma Supreme Court ruled that the state statute did not apply to respondent's sign since it would have violated

both the Constitution of the State of Oklahoma and the Constitution of the United States if it did so apply.

The Supreme Court of the State of Oklahoma's decision that the Act would be unconstitutional under the Oklahoma Constitution if it were applied to the respondent's sign is conclusive as to that question and cannot be reviewed by the Supreme Court of the United States. Chesapeake & O.R. Co. vs. Public Service Com., 224 U.S. 603, LEd 520, 37 S Ct 234 (1917).

The only federal question therefore, to be reviewed by the Supreme Court of the United States is whether or not the Oklahoma Act would be invalid under the Constitution of the United States if applied to respondent's sign. And this question would no longer effect the rights of the parties herein. Even if the Supreme Court of the United States were to decide that the Oklahoma Act was valid under the Constitution of the United States if applied to respondent's sign, respondent's sign would still be protected under the Oklahoma Constitution pursuant

to the decision below by the Oklahoma Supreme Court which is controlling on the United States Supreme Court with regard to that question.

Thus, for the Supreme Court of the United States to decide the federal question would not effect the rights of the litigants and would be merely an advisory opinion. Federal Courts are without power to give advisory opinions which cannot effect the rights of the litigants in the case before it. St. Pierre v. United States (1943) 319 US 41, 87 L Ed 1199, 63 S Ct 910.

Wherefore, the Petition for a Writ of Certiorari should be denied.

II.

Petitioner argues as a reason for granting the Writ of Certiorari that the Oklahoma Supreme Court erred as a matter of law and decided in a way not in accord with applicable decisions of the United States Supreme Court.

This allegation by petitioner is without grounds. In deciding that applying the Oklahoma Act to the respondent's sign would raise serious

doubts as to its constitutionality, that the Court should interpret the Act in order to avoid constitutional doubt, and that, therefore, the Act did not apply to respondent's sign, the Oklahoma Supreme Court cited twenty-four (24) decisions of the United States Supreme Court including those decisions which petitioner argues are applicable to the issue herein.

A. Petitioner argues that the Oklahoma Supreme Court definition of advertising as commercial advertising is contrary to the statutory definition and to case law. Petitioner is incorrect.

The case law in the United States is overwhelmingly to apply general laws regulating signboards, including laws very similiar to Oklahoma's and enacted pursuant to the same federal statute, to commercial signs only. Wildman Arms, Inc. of Swarthmore v. Zoning Hearing Board, Pennsylvania Commonwealth, 328 A.2d 528 (1974); E.B. Elliott Advertising Co. v. Metropolitan Dade County, 294 F.Supp. 412 (S.D. Fla. 1968), Affd., 425 F.2d 1141 (5th Cir 1970); Micalite Sign Corp. v.

State Highway Department, 236 A.2d 680 (Vt. 1967); Ghaster Properties, Inc. v. Preston, 200 N.E.2d 328 (Ohio 1964); Peltz v. City of South Euclid, 228 N.E. 2d 320, 324 (Ohio 1967); Burk v. Municipal Court of Whittier Judicial District, 40 Cal.Rptr. 425, 229 C.A.2d 696 (1964); In re Opinion of the Justices, 169 A.2d 762 (N.H. 1961).

There are scores of cases in 72 A.L.R. 465; 156 A.L.R. 581; 58 A.L.R.2d 1314 and all of the supplements thereto dealing with statutes concerning municipal and governmental power as to billboards and outdoor advertising. None of them concerned anything but commercial advertising.

Petitioner has cited only one case which has applied general laws regulating signboards to non-commercial signs.

B. Petitioner claims that the Oklahoma Supreme Court cited no cases in support of its conclusion that the highway is an appropriate public forum for free speech. Petitioner is again incorrect. The Oklahoma Supreme Court discussed in length free speech activity in a public forum, citing at least eight decisions

of the United States Supreme Court to support its conclusion. (603 P.2d 340-341).

Petitioner cites Justice Douglas in Lehman, supra., at 306 to the effect that a highway is not a meeting place for discussion. First of all, Justice Douglas' statement was dicta and neither the plurality or minority decision in the case ruled that the transit vehicles involved therein could not be a public forum for free speech. Furthermore, the fact that Justice Douglas stated that certain places are not meeting places for discussion does not mean that they are not public forums for free speech. The question is not whether or not personal discussion may be had, but whether or not one has the right to disseminate information and the right to receive it. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209, 95 S.Ct. 2268, 2272, 45 L.Ed.2d 125 (1975); and see citations at 603 P.2d 339, n.1.

C. Petitioner argues that the Oklahoma Supreme Court decision ignored the case law concerning the state's police

power to regulate billboards for reasons of safety and aesthetics.

Again, the Petitioner is incorrect. The Oklahoma Supreme Court discussed fully the safety and aesthetic arguments made in the cases cited by Petitioner and found them to be insufficient under Thomas v. Collins, 323 U.S. 516, at 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945); Bates vs. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); (603 P.2d 342-343); and Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

Petitioner's citation to Berman v. Parker, 348 U.S. 26, 75 S.Ct. 84, 99 L. Ed. 27 (1954) is inappropriate since said case itself admits that the exercise of police power is "subject to specific constitutional limitations." Id. at 32.

The greatest constitutional limitation on the exercise of the police power is free speech under the First Amendment to the Constitution of the United States which is why any system of prior restraints of expression comes before a court bearing a heavy presumption against its constitutional validity. See the

eight (8) decisions of the Supreme Court of the United States cited by the Supreme Court of Oklahoma (603 P.2d 340).

The Supreme Court of Oklahoma was bound to accept an interpretation that avoided constitutional doubt as to the validity of the statute involved. U.S. v. Harris, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954). The Supreme Court of Oklahoma has held respondent's non-commercial speech not to be regulated by the pertinent statute and has avoided the danger of unconstitutionality under the applicable case law of Oklahoma and the Supreme Court of the United States.

Therefore, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

Wherefore, for the foregoing reasons and authorities, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated:
May 1, 1980

No. 79-1617

SEP 16 1980

MICHAEL RODAK, JR., CL

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF OKLAHOMA ex rel. DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA,

Petitioner,

VERSUS

MRS. C. V. PILE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

REPONDENT'S RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Dated: September, 1980

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1617

STATE OF OKLAHOMA ex rel DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA, Petitioner

v.

MRS. C. V. PILE, Respondent

RESPONDENT'S RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Mrs. C. V. Pile, Respondent herein, files this Brief in response to the Brief filed for the United States as Amicus Curiae, and she renews her prayer that Petitioners Petition for a Writ of Certiorari be denied.

TABLE OF CONTENTS

	Page
Question Presented	1
Argument	1
I. State Decision Supported By Non-Federal Ground	3
II. State Decision in Accord With Decisions of This Court	5
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Baldwin v. Redwood City, 540 F. 2d 1360, 1366 (9th Circuit 1976, cert. denied, 431 US 913 (1977) 10

California v. LaRue, 409 US 109, 117 (1973) 13

Cantwell v. Conneticutt, 310 US 296, 305 (1940) 10

Consolidated Edison v. Public Service Commission, No. 79-134 (June 20, 1980), 48 LW 4776, 4777 14

Donnelly Advertising Corp. v. Mayor and City Council of Baltimore, 279 Md. 660, 370 A. 2d 1127 (1977) 7

Cases-Continued:

Hague v. C.I.O., 307 US 496, 515 (1939) 10

Lehman v. City of Shaker Heights, 418 US 298 10

Mental Hygiene Dept. of Cal. v. Kirchner, 380 US 194, 197-198 (1965) 4

Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P 2d 407, 164 Cal. Rptr. 510 (1980), appeal pending, No. 80-195, and cert. pending, No. 80-196 7

Monitor Patriot Co. v. Roy, 401 US 265, 272 (1971) 13

NAACP v. Button, 371 US 415, 433 (1963) 9

Ohralik v. Ohio State Bar Association, 436 US 447, 455-456 (1978) 13

Police Department of Chicago v. Mosley, 408 US 92, 96 (1972) ... 13

Schneider v. State, 308 US 147, 165 (1939) 9-10, 13

Southeastern Promotions, Ltd. v. Conrad, 420 US 546, 552-553 (1975) 9

Cases-Continued:

State v. Pile, 603 P 2d 337, (Okl., 1979) ..... 4-5, passim

Veterans of Foreign Wars v. City of Steamboat Springs, 195 Colo. 44, 575 P 2d 835, appeal dismissed, 439 US 809 (1978) 6

Washington v. Lotz, 92 Wash. 2d 52, 593 P 2d 811, appeal dismissed, 444 US 921 (1979 6

Zacchini v. Scripps-Howard Broadcasting Co., 433 US 562, 568 (1977) 5

Constitutions and statutes:

United States Constitution

First Amendment ..... passim

Fourteenth Amendment 3

Oklahoma Constitution, Article II, Section 22 3-5

Oklahoma Outdoor Advertising Control Act, 69 O.S. §1271 et seq. 1

§1271 8

§1273 14

§1274 14

§1277 9

QUESTION PRESENTED

The primary question for consideration is whether or not the Oklahoma Out door Advertising Control Act (69 O.S. § 1271-1285) violates the Constitution of the United States if applied to Mrs. Pile's "non-commercial" billboard.

ARGUMENT IN RESPONSE TO BRIEF OF UNITED STATES AND FOR DENYING PETITION FOR A WRIT OF CERTIORARI

The Brief for the United States confuses the facts and the issues and then urges this Court to remand the case for clarification of the facts and the issues which have simply been confused by the United States' own Brief. Although the record may not be clear to the United States, it is obvious that the record is clear to the Petitioner who has not raised any of the factual or legal issues for clarification raised by the United States. For instance, Petitioner could have amended its Petition, alleged additional facts, and sought a further evidentiary hearing. The Petitioner saw no reason to do so and stood on its Petition (transcript, Septem-

ber 20, 1977, record below, page 91-92).

The United States claims that Respondent never contended that her sign came within the Oklahoma Acts exemption for on-premise signs, that the record is unclear on this issue, and that it would be helpful for the trial court to hold an evidentiary hearing on such issue (Amicus Curiae Brief, page 16-17). Again, this is incorrect. At the trial court level, in her Reply Brief in support of Defendant's Demurrer, Mrs. C. V. Pile noted that the only way her non-commercial sign could be located in her non-business area would be if it were construed to be an on-premise sign in which the activity conducted on the premises was the expression of the non-commercial opinion itself (record below, page 27). Petitioner did not adopt such a construction of the statute and did not choose to amend its Petition to state such a cause of action.

The case was decided as a matter of law by the trial court and by the Supreme Court of Oklahoma, and both parties have agreed that there was never any dispute as to any material fact, that there was no need for any further evidentiary hearings,

and that the issues were ones of law ready to be determined by the Courts.

Thus, the issues presently before this Court are, first, whether or not the decision of the Oklahoma Supreme Court is supported by a non-federal ground; and, second, if the decision below is not supported by a non-federal ground, whether or not the decision by the Oklahoma Supreme Court was in accord with applicable decisions of this Court.

I.

The decision of the Oklahoma Supreme Court is supported by an adequate and independent non-federal ground, namely, Article II § 22 of the Oklahoma Constitution. Mrs. Pile's Demurrer at the trial court below asserted that her non-commercial billboard message was not covered by the state statute because if it were, the statute would be unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article II, § 22 of the Oklahoma Constitution. Said Demurrer was sustained by the trial court. The Oklahoma Supreme Court in its decision below quoted from said free speech section of the Oklahoma Constitution, acknowledged

that the trial court based its decision on the Federal Constitution "in addition to" the State Constitution, and affirmed the trial court's decision "in all respects." State v. Pile 603 P 2d 337, 339, 343 (Okl., 1979).

> This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.
>
> . . . .
>
> . . . we would have jurisdiction to review only if the federal ground had been the sole basis for the decision, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution. Mental Hygiene Dept. of Cal. v. Kirchner, 380 US 194, 197-198 (1965).

Obviously, the Federal Constitution was not the sole basis for the decision by the Oklahoma Supreme Court, nor did the Oklahoma Supreme Court state they were compelled by the Federal Constitution to interpret the State Constitution as they did. In their decision, the Oklahoma Supreme Court referred to the Oklahoma Con-

stitution first and then secondarily referred to the Federal Constitution "in addition to the guarantee of that right in the preceding excerpt from this State's Constitution." 603 P 2d at 339. It seems clear that, even if Mrs. Pile had not raised the United States Constitution, the Supreme Court of Oklahoma would have ruled precisely as it did based on the Oklahoma Constitution.

Thus, this case is not like those in which this Court has assumed jurisdiction because the State Court did not mention the State Constitution, or cited only Federal cases as controlling or compelling an interpretation of the State Constitution contrary to how they would have interpreted the State Constitution under State decisions. Zacchini v. Scripps-Howard Broadcasting Co., 433 US 562, 568 (1977).

Wherefore, the Petition herein for a Writ of Certiorari should be denied.

II.

Even if the decision below by the Oklahoma Supreme Court were not supported by an adequate and independent non-federal ground, the decision was in accord with applicable decisions of this Court and,

therefore, the Petition for a Writ of Certiorari should be denied.

A. The Brief for the United States, page 11, claims that the Oklahoma Supreme Court's decision is inconsistent with almost all other state decisions. This is simply not true. All cases cited by the United States, except for three, apply statutes regulating billboards to commercial signs only.

Of all the scores of cases nationwide dealing with statutes concerning municipal and governmental power as to billboards and outdoor advertising (see Respondent's Brief herein, May 12, 1980, pp 6-7), Petitioner and the United States have cited only three which apply billboard statutes to non-commercial messages.

One of these, Veterans of Foreign Wars v. City of Steamboat Springs, 195 Colo. 44, 575 P 2d 835, appealed dismissed, 439 US 809 (1978), is distinquishable from the case herein since Veterans dealt with regulations of signs extending over public property whereas the statute herein does not.

The other two cases, Washington v. Lotz, 92 Wash. 2d 52, 593 P 2d 811, appeal

dismissed, 444 US 921 (1979) and Donnelly Advertising Corp. v. Mayor and City Council of Baltimore, 279 Md. 660, 370 A. 2d 1127 (1977), are simply inconsistent with the case law in the United States which is overwhelmingly to apply general laws regulating billboards, including laws very similar to Oklahoma's and enacted pursuant to the same Federal statute, to commercial signs only.

In fact, one of the cases cited by the United States, Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P 2d 407, 164 Cal. Rptr. 510 (1980), appeal pending, No. 80-195, and cert. pending, No. 80-196, construed the statute therein precisely as the Oklahoma Supreme Court did in the case herein and adopted a "narrow construction limiting its proscription to those signs which clearly fall within the intendment of the enactment," namely, "commercial billboards" in order to avert the "danger that the ordinance might be construed to apply to signs of a character very different from commercial billboards" and "to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail." Metromedia, supra, 610 P 2d at

410, n.2.

The only two cases cited by the United States and the position taken by the United States are inconsistent with the decisions of this Court as explained hereafter and by the decision of the Oklahoma Supreme Court below.

It should be noted that the four decisions of this Court cited by the United States in its Brief, page 10, dealing with billboard regulations all apply the statutes involved to commercial advertising and none of the four cases even involve free speech or discuss the First Amendment to the Constitution of the United States.

B. The Brief for the United States, page 13-14, states that the Oklahoma Act is not a "prior restraint" and that the highway is not a "public forum", contrary to the decision of the Oklahoma Supreme Court. The position of the United States is incorrect.

The Oklahoma Act authorizes the Department of Transportation to "implement and enforce this Act" (69 O.S. § 1271), said department having promulgated rules and regulations for the effective control

of outdoor advertising. There is nothing in the way of "narrow specificity" (NAACP v. Button, 371 US 415, 433 (1963)) in the Act in the way it regulates non-commercial signs if it is construed to so regulate said signs, especially since non-commercial signs are nowhere mentioned in the Act. 69 O.S. § 1277 authorizes the State Transportation Commission "to enact and adopt rules and regulations for the issuance of licenses and permits and the charging and collection of permit fees," apparently in whatever manner the Commission deems necessary and with no limitations on said rules and regulations as they pertain to non-commercial signs protected under the State and Federal Constitutions.

All such statutes stricken down by this Court have had one thing in common: "they gave public officials the power to deny use of a forum in advance of actual expression." Southeastern Promotions, Ltd. v. Conrad, 420 US 546, 552-553 (1975).

Doubtless there are other features of non-commercial billboards which may be regulated in the public interest, such as blinding lights or impairment of vision, "without prior licensing or other invasion

of constitutional liberty." Schneider v. State, 308 US 147, 165 (1939).

If non-commercial signs were construed to be exempt because related activities other than the sign itself were conducted on the premises, as the United States suggests in their Brief, page 16, n.12, the danger of prior restraints on First Amendment rights would increase since the public official's decision to issue or refuse the permit would involve the "appraisal of facts, the excersise of judgment, and the formation of an opinion" as to whether or not the sign related to the activities conducted on the premises. Cantwell v. Conneticutt, 310 US 296, 305 (1940).

Thus, the Oklahoma Supreme Court's decision that the Oklahoma Act is a prior restraint is correct.

Likewise, the decision below is correct in ruling that the highway is a "public forum". Schneider v. State, supra; Hague v. C.I.O., 307 US 496, 515 (1939); Baldwin v. Redwood City, 540 F. 2d 1360, 1366 (9th circuit 1976), cert. denied, 431 US 913 (1977). The reference to Justice Douglas' dicta in Lehman v. City of Shaker Heights, 418 US 298, 306 in the Brief for

the United States at page 14 has already been dealt with in Respondent's previous Brief herein at page 7.

Highways in Oklahoma are obviously a "public forum" for free speech such as billboards since highway billboards have traditionally been used for non-commercial messages in Oklahoma. All one has to do is look around and observe the numerous billboards being used during this campaign year by candidates to realize that highways are a significant "public forum" for free speech.

C. The Brief for the United States, page 15, claims that the Oklahoma Supreme Court erroneously ignored the logic of the distinction between on-premise signs and off-premise signs. The United States claims that such distinction has long been accepted by courts as a reasonable basis for differential regulations. However, every case cited by the United States to support its position applied the billboard statute under consideration to commercial messages only and not to non-commercial billboards. The distinction between on-premise signs and off-premise signs has <u>not</u> long been accepted by courts as a

reasonable basis for differential regulations between commercial signs and non-commercial signs.

It takes little imagination to illustrate the paradoxical scope of such a policy. For example, a cigarette factory located near a freeway could advertise the desirability of smoking its brand, but a cancer society could not advertise that cigarette smoking is hazardous to ones health. Or a theatre located along an interstate highway could advertise a motion picture that portrays sex and violence, but the Legion for Decency could not post a message for clean films. A lumber company could advertise its wood products, but a conservation group could not maintain a sign urging citizens to write to the President or Governor about protecting our natural resources. Obviously, the above non-commercial off-premise signs would not be as effective if they could not be located near the above described on-premises commercial billboards.

The interpretation by the Petitioner and the United States would raise commercial speech from "its subordinate posi-

tion in the scale of First Amendment values" and place it above pure speech concerning political issues which is entitled to the fullest and most urgent application of constitutional guarantees. Ohralik v. Ohio State Bar Association, 436 US 447, 455-456 (1978); Schneider v. State, supra, at 161; Monitor Patriot Co. v. Roy, 401 US 265, 272 (1971); California v. LaRue, 409 US 109, 117 (1973).

If Mrs. Pile's sign read "tomatoes for sale here," it would not be prohibited; but because it reads "Get US out of the United Nations," it is prohibited in a non-commercial zone if the Oklahoma Act is construed to apply to non-commercial signs. Thus, if applied to non-commercial signs, the Oklahoma Act prohibits Mrs. Pile's sign based on the content of said sign. Once one class is allowed to use a forum, government cannot exclude other classes from using the same forum based on the content of the speech. Police Department of Chicago v. Mosley, 408 US 92, 96 (1972).

This Court has ruled recently that the Public Service Commission of the State of New York could not justify its ban on the use of non-commercial mailing inserts

on the ground that consumers will benefit from receiving "useful" information, but not from the prohibited information. Consolidated Edison v. Public Service Commission, No. 79-134 (June 20, 1980), 48 LW 4776, 4777.

Just as the "Commission's own rationale demonstrates that it's action cannot be upheld as a content-neutral time, place, or manner regulation" (Id.), likewise, the Oklahoma Act prohibits non-commercial billboards while permitting on-premise commercial signs and "official signs" and "informational signs" "deemed to be in the interest of the traveling public." 69 Oklahoma Statues § 1273, 1274. Therefore, if applied to non-commercial signs, the Oklahoma Act would be justifying its ban on the ground that consumers will benefit from receiving information from on-premise, official and informational signs but not from non-commercial signs. As a result, the Oklahoma Act can not be upheld as a content-neutral time, place or manner regulation.

It is for precisely the above reasons and the others set forth in its decision that the Supreme Court of Oklahoma held

Respondent's non-commercial speech to be not regulated by the Oklahoma Act and thereby avoided the danger of unconstitutionality under the applicable case law of Oklahoma and Supreme Court of the United States.

CONCLUSION

Wherefore, for the foregoing reasons and authorities cited herein and in Respondent's earlier Brief, the Petitioners Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 79-1617

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In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF OKLAHOMA EX REL. DEPARTMENT OF TRANSPORTATION OF THE STATE OF OKLAHOMA, PETITIONER

v.

MRS. C. V. PILE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a ban on billboards in areas adjacent to highways in the federal-aid highway system and outside of commercial and industrial zones would violate the First Amendment if it applied to billboards with noncommercial messages.

TABLE OF CONTENTS

Page

Statement 1

Discussion 6

Conclusion 18

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Air Pollution Variance Board of Colorado v. *Western Alfalfa Corp.*, 416 U.S. 861 8-9

Baldwin v. *Redwood City*, 540 F. 2d 1360, cert. denied, 431 U.S. 913 12

Board of Adjustment v. *Osage Oil & Transportation, Inc.*, 258 Ark. 91, 522 S.W.2d 836, cert. denied and appeal dismissed, 423 U.S. 941 15

California v. *Krivda*, 409 U.S. 33 8

Carey v. *Brown*, No. 79-703 (June 20, 1980) 16

Consolidated Edison v. *Public Service Comm'n*, No. 79-134 (June 20, 1980) 9

Cox v. *New Hampshire*, 312 U.S. 569 14

Donnelly Advertising Corp. v. *Mayor and City Council of Baltimore*, 279 Md. 660, 370 A. 2d 1127 ..... 12, 13

E.B. Elliott Advertising Co. v. *Metropolitan Dade County*, 425 F. 2d 1114, cert. dismissed, 400 U.S. 805 15

Page

Cases—Continued:

Erznoznik v. *City of Jacksonville*, 422 U.S. 205 ..... 9, 11

Fifth Avenue Coach Co. v. *City of New York*, 221 U.S. 467 10

General Outdoor Advertising Co. v. *Department of Public Works*, 289 Mass. 149, 193 N.E. 799, appeals dismissed, 296 U.S. 543, 297 U.S. 725 15

Hennessey v. *Independent School Dist. No. 4, Lincoln County, Okla.*, 552 P. 2d 1141 7

John Donnelly & Sons v. *Mallar*, 453 F. Supp. 1272, appeal pending, No. 79-1575 (1st Cir.) 12

John Donnelly & Sons, Inc. v. *Outdoor Advertising Board*, 369 Mass. 206, 339 N.E. 2d 709 12

Kovacs v. *Cooper*, 336 U.S. 77 9

Lehman v. *City of Shaker Heights*, 418 U.S. 298 ..... 10, 14

Lubbock Poster Co. v. *City of Lubbock*, 569 S.W. 2d 935, cert. denied, 444 U.S. 833 11

Markham Advertising Co. v. *State*, 73 Wash. 2d 405, 439 P. 2d 248, appeal dismissed, 393 U.S. 316 ..... 12, 15

Mental Hygiene Dep't v. *Kirchner*, 380 U.S. 194 ..... 7, 8

Page

Cases—Continued:

Metromedia, Inc. v. *City of San Diego*, 26 Cal. 3d 848, 610 P. 2d 407, 164 Cal. Rptr. 510, appeal pending, No. 80-195, and cert. pending, No. 80-196 ..... 7, 8, 11, 14, 15

Minnesota v. *National Tea Co.*, 309 U.S. 551 ..... 7, 8

Newman Signs, Inc. v. *Hjelle*, 268 N.W. 2d 741, appeal dismissed, 440 U.S. 901 11

Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 15

Packer Corp. v. *State of Utah*, 285 U.S. 105 10

Pruneyard Shopping Center v. *Robins*, No. 79-289 (June 9, 1980) 7

St. Louis Poster Advertising Co. v. *City of St. Louis*, 249 U.S. 269 10

Schneider v. *State*, 308 U.S. 147 13

Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 13

Stuckey's Stores, Inc. v. *O'Chesky*, 93 N.M. 312, 600 P. 2d 258, appeal dismissed, No. 79-1233 (May 12, 1980) 11

Suffolk Outdoor Advertising Co. v. *Hulse*, 43 N.Y. 2d 483, 373 N.E. 2d 263, 402 N.Y.S. 2d 368, appeal dismissed, 439 U.S. 808 ..... 12, 13

Page

Cases—Continued:

Thomas Cusack Co. v. *City of Chicago*, 242 U.S. 526 10

United Advertising Corp. v. *Raritan*, 11 N.J. 114, 93 A.2d 362 15

Veterans of Foreign Wars v. *City of Steamboat Springs*, 195 Colo. 44, 575 P. 2d 835, appeal dismissed, 439 U.S. 809 ..... 11-12, 13

Washington v. *Lotze*, 92 Wash. 2d 52, 593 P. 2d 811, appeal dismissed, 444 U.S. 921 ..... 11, 13

Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 ..... 13, 15

Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 6

Constitutions, statutes and regulations:

United States Constitution:

First Amendment ..... passim

Fourteenth Amendment 9

California Constitution, Article 1, Section 2 7

Oklahoma Constitution, Article 2, Section 22 ..... 5, 7

Highway Beautification Act of 1965, 23 U.S.C. (& Supp. II) 131 *et seq.*:

23 U.S.C. 131 *et seq.* 3, 10

23 U.S.C. 131(a) 3, 11

Page

Constitutions, statutes and regulations—Continued:

23 U.S.C. 131(b) 3
23 U.S.C. (Supp. II) 131(c) 3, 1a
23 U.S.C. (& Supp. II) 131(g) 12
23 U.S.C. 131(n) 12
Oklahoma Outdoor Advertising Control Act, Okla. Stat. tit. 69, § 1271 *et seq.* (West 1969 & Cum. Supp. 1979-1980) 1
§ 1271 (Cum. Supp. 1979-1980) 1, 11
§ 1273(a) (Cum. Supp. 1979-1980) 5
§ 1273(m) (1969) 1
§ 1273(m) (Cum. Supp. 1979-1980) 1
§ 1274 (1969) 1
§ 1274(b) (1969) 10, 16
§ 1275 (Cum. Supp. 1979-1980) 2
§ 1277 (Cum. Supp. 1979-1980) 2
§ 1280(d) (Cum. Supp. 1979-1980) 12
23 C.F.R. 470.105(a)-(b) 3
23 C.F.R. 470.107 3
23 C.F.R. 750.705 ..... 3, 2a
23 C.F.R. 750.709 16
Oklahoma Transportation Commission Rules, Regulations, Policies, and Procedures Adopted Dec. 6, 1976 (Revised Feb. 6, 1980), Art. IX-C, § 4(b) 2, 16

Page

Miscellaneous:

Federal Highway Administration, U.S. Department of Transportation, *Highway Statistics—1978* (1979) 3

This brief is filed in response to the Court's invitation of June 2, 1980, to the Solicitor General to express the views of the United States.

STATEMENT

1. The Oklahoma Outdoor Advertising Control Act (Okla. Stat. tit. 69, § 1271 *et seq.* (West 1969 & Cum. Supp. 1979-1980)) was enacted to protect the public investment in public highways, to preserve the scenic beauty of lands bordering public highways, and to promote public safety, health, and welfare, and the convenience and enjoyment of the traveling public. § 1271 (West Cum. Supp. 1979-1980). When this action was brought, the Act regulated outdoor advertising visible from the "main-traveled" way and within 660 feet of the nearest edge of the right-of-way on any interstate or primary highway. § 1273(m) (West 1969).[1] Under the Act, no signs may be erected or maintained in a control area except for (§ 1274 (West 1969)):

> (a) Informational and other official signs, including, but not limited to, signs pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, and which comply with regulations which shall be promulgated by the Department relative to their lighting, size, number, spacing, and such other requirements as may be appropriate to implement this Act, provided,

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[1] As amended in 1978, the Act has expanded control to include both those areas within 660 feet of the nearest edge within urban areas and those areas visible from the main traveled way outside of urban areas. § 1273(m) (West Cum. Supp. 1979-1980). The title of the statute as first enacted was the "Highway Advertising Control Act of 1968"; a comprehensive set of 1972 amendments was called the "Highway Advertising Control Act of 1972." We refer to the statute by the name used by petitioner (Pet. 5).

however, that such regulations shall not be inconsistent with, nor more restrictive than, such national standards as may be promulgated from time to time by the Secretary of the Department of Transportation of the United States pursuant to federal law.

(b) On-premise activities signs advertising activities conducted on the property on which they are located, including but not limited to, goods sold, stored, manufactured, processed or mined thereon; services rendered thereon; and entertainment provided thereon.

(c) On-premise sale or lease signs advertising the sale or lease of property upon which they are located.

(d) Signs in existence in business areas on the effective date of this Act and signs erected within six (6) months thereafter upon property in business areas leased prior to said effective date, subject to the conditions set forth in Section [1278].

(e) Signs which are to be erected in business areas and which will comply when erected with the provisions of Section [1275] of this Act, and after the applicable provisions of Section [1277] are met.

The statute provides standards for signs allowed in business areas, regulating type, size, spacing, and lighting. § 1275 (West Cum. Supp. 1979-1980). Licenses and permits are required for all outdoor advertising structures other than "on-premise" signs. § 1277 (West Cum. Supp. 1979-1980).[2]

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[2]"On-premise sign" is defined as follows in Oklahoma's regulations (Oklahoma Transportation Commission Rules, Regulations, Policies, and Procedures Adopted Dec. 6, 1976 (Revised Feb. 6, 1980), Art. IX-C, § 4(b)):

> Signs consisting solely of the name of the establishment or which identify the establishment's principal or accessory

The Oklahoma Act was designed to satisfy requirements of the Highway Beautification Act of 1965, 23 U.S.C. 131 *et seq.*, which Congress enacted to control outdoor advertising signs in areas adjacent to highways in the nation's "Interstate System and * * * primary systems." 23 U.S.C. 131(a).[3] The Beautification Act has safety and scenic preservation goals similar to those of the Oklahoma statute. *Ibid.* Under the Beautification Act, the federal government may reduce by 10% the federal highway funds allotted to any state that does not provide "effective control" of highway signs. 23 U.S.C. 131(b). "Effective control" is defined by the Act (23 U.S.C. (Supp. II) 131(c)) and by the United States Department of Transportation's implementing regulations (23 C.F.R. 750.705).[4] Notwithstanding its role in triggering the enactment of the Oklahoma statute, the Beautification Act was not directly involved in the decisions of the courts below.

2. On April 30, 1973, respondent applied for a permit to register an outdoor advertising structure she had

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products or services offered on the property, and signs advertising the sale or lease of property on which they are located, are considered on-premise signs. Signs located on narrow strips of land contiguous to the advertised activity when the purpose clearly is to circumvent the Oklahoma Highway Advertising Control Act shall not qualify as on-premise signs.

[3] "Interstate and primary system highways" are defined at 23 C.F.R. 470.105(a)-(b). See also 23 C.F.R. 470.107. We are advised by the Department of Transportation that these two systems constitute about eight percent of all highways in the United States and most of the major interstate highways. Federal Highway Administration, U.S. Department of Transportation, *Highway Statistics—1978*, at 133, 149 (1979). All 50 states have enacted outdoor advertising laws similar to the one at issue here in order to receive full federal highway funding.

[4] These provisions are set out in an Appendix to this brief.

erected (Exh. A to Plaintiff's Brief in Opposition to Defendant's Demurrer). According to the permit application, respondent had erected the structure in October 1972; it is 41½ feet from U.S. Highway 270 and rises to a height of about nine feet above the ground, with two panels (V-type), each four feet high and eight feet wide. The message on each panel, according to the application, is "GET US OUT OF THE UNITED NATIONS." On January 14, 1976, the Oklahoma State Highway Commission notified respondent that the sign was unlawful under the Outdoor Advertising Control Act and that she had 90 days to remove it (Attachment to Plaintiff's Petition for Mandatory Injunction). Respondent took no action.

3. On December 21, 1976, the Oklahoma Department of Transportation filed in the District Court in and for Harper County a petition for mandatory injunction. The petition alleged that the sign was erected after the effective date of the Act, and is unlawful under its terms since the structure is within 660 feet of a highway within the federal-aid primary highway system and is not in a "business area" as defined by the statute. The petition requested the district court to order the removal of respondent's advertising structure.

On February 11, 1977, respondent demurred to the petition on the ground that it did not state a cause of action. Respondent argued that the Oklahoma Outdoor Advertising Control Act does not apply to noncommercial messages. The trial court sustained respondent's demurrer on September 20, 1977, finding that the petition did not state facts sufficient to constitute a cause of action (Pet. App. B). In ruling from the bench, the trial judge expressed his opinion (Pet. App. A4) that "if this statute were to be applied to this particular defendant and this particular sign * * * it would be an infringement upon

the first amendment rights of the defendant to express herself on political issues."

4. The State appealed to the Oklahoma Supreme Court, which, with one justice dissenting in full and one dissenting in part, affirmed the trial court (Pet. App. A1-A18).

The Oklahoma Supreme Court held (Pet. App. A10) that the constitutionality of the Oklahoma Outdoor Advertising Control Act would be subject to "serious" doubt were the Act's restrictions to be construed as applicable to "non-commercial speech." To avoid the constitutional problem it perceived, the court concluded (*ibid.*) that the statutory definitions of " 'sign,' 'outdoor advertising,' [and] 'outdoor advertising device,' " which define the Act's coverage (Okla. Stat. tit. 69, § 1273(a) (West Cum. Supp. 1979-1980)), "[do] not cover non-commercial speech." The court found the statute "easily susceptible" to this reading (Pet. App. A10).

In determining that without this narrowing construction the statute would be of doubtful constitutionality, the court cited (Pet. App. A3, A4) both the First Amendment to the United States Constitution and Article 2, Section 22 of the Constitution of Oklahoma, which provides, *inter alia*, that "[e]very person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right * * *." The court equated the application of the Act's location restrictions on outdoor advertising to noncommercial signs with "prior restraints" on free speech in a "public forum" (*i.e.*, highways), sustainable only on a showing of "clear and present danger" to public interests (Pet. App. A5-A7, A9). The court rejected (Pet. App. A8-A10), as inadequate justifications, the State's interest in preserving scenic beauty and promoting public safety, concluding that

aesthetic goals are not compelling state interests (*id.* at A8) and that the Act's exemptions for certain areas and certain signs were inconsistent with its stated objective of promoting safe driving (*id.* at A9-A10).

Each of the dissenting justices was of the view that respondent's demurrer should not be sustained because the State was thereby deprived of an opportunity to prove that the Act served governmental interests that would justify the place and manner restrictions it imposed on billboards like the one erected by respondent (Pet. App. A15).

DISCUSSION

We believe that the Oklahoma Supreme Court was incorrect in suggesting that the place and manner restrictions specified by the Oklahoma Outdoor Advertising Control Act would violate the First Amendment if applied to billboards with noncommercial messages. Because the court also rested its decision on a free speech provision of the Oklahoma Constitution that is arguably broader than the First Amendment, however, the holding may be supported by an adequate and independent nonfederal ground; a remand of the case for clarification on that point would, accordingly, be appropriate. On remand, the Oklahoma Supreme Court might also deem it useful to remand the case to the trial court for the taking of evidence that would provide a better basis for deciding the federal constitutional issue, if the decision does not rest independently on an adequate nonfederal ground.

1. A jurisdictional question arises because the decision of the Oklahoma Supreme Court may be supported by an adequate and independent nonfederal ground. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). In our view, the problem is not that the court merely construed, rather than invalidated, a state statute,

for that construction was evidently made under constitutional compulsion and hence would not provide an independent ground. *Mental Hygiene Dep't* v. *Kirchner*, 380 U.S. 194, 198 (1965); *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 554-555 (1940). Thus, the court held (Pet. App. A8-A10) that the statute was a restriction on free speech that could be justified only by a showing of clear and present danger, and it rejected the State's justifications. It announced, moreover, that it was "bound" to interpret the statute in a manner that "avoids constitutional doubt" (*id.* at A10). The jurisdictional question arises, we submit, because, in discussing the constitutional issue, the court cited (Pet. App. A3-A4) both the First Amendment to the federal Constitution and Article 2, Section 22—the free speech guarantee—of the Oklahoma Constitution.

While the court did not state that the Oklahoma constitutional provision is broader than the First Amendment and, while it has employed a single analysis in previous decisions citing the two constitutional guarantees (see, *e.g.*, *Hennessey* v. *Independent School Dist. No. 4, Lincoln County, Okla.*, 552 P.2d 1141 (1976)), the fact remains that the language of the Oklahoma provision does not simply track that of the First Amendment. Indeed, it is substantially similar to a provision in the California Constitution (Art. 1, § 2), that the California Supreme Court has construed as providing protections broader than the First Amendment. *Pruneyard Shopping Center* v. *Robins*, No. 79-289 (June 9, 1980), slip op. 4.[5] "While we might speculate from the

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[5]In *Metromedia, Inc.* v. *City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), appeal pending, No. 80-195, and cert. pending, No. 80-196, however, the California Supreme Court held that a city ordinance banning off-site billboards did not violate either the federal or the California free speech constitutional

choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment" of the court below, it cannot be said "with any degree of certainty" that the judgment "was not based on an adequate and independent nonfederal ground." *Mental Hygiene Dep't* v. *Kirchner*, *supra*, 380 U.S. at 196-197.[6] Were the Court to assume that the First Amendment was ultimately the sole basis for the judgment, the Oklahoma Supreme Court could, "in another case presenting the same issues[,]" announce that the decision had an independent basis in the Oklahoma Constitution, leaving "the result untouched by whatever conclusions this Court might have reached on the merits of the federal question." *Id.* at 197.

If the Court agrees that the substantial reliance of the court below on this Court's precedents is not sufficient to resolve the ambiguity, we suggest that the Court, as it has done on such occasions in the past, vacate the lower court's judgment and remand the case to the Oklahoma Supreme Court for clarification. *California* v. *Krivda*, 409 U.S. 33 (1972); *Mental Hygiene Dep't* v. *Kirchner, supra,* 380 U.S. at 196-197; *Minnesota* v. *National Tea Co., supra* 309 U.S. at 555-557. See also *Air Pollution*

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guarantees. 610 P.2d at 416-420, 164 Cal. Rptr. at 519-523. The court construed the law as applying only to permanent signs used for the display of "a commercial or other advertisement to the public." 610 P.2d at 410 n.2, 164 Cal. Rptr. at 513 n.2. The court distinguished the decision in the present case as one in which the holding "is limited to a question of Oklahoma constitutional law." 610 P.2d at 417 n.13, 164 Cal. Rptr. at 520 n.13.

[6]The court below describes the First Amendment as a protection that existed "in addition to" the Oklahoma free speech guarantee (Pet. App. A4), but we do not regard that as a sufficient indication that the court regards its constitutional provision as having a significance independent of the First Amendment.

Variance Board of Colorado v. *Western Alfalfa Corp.*, 416 U.S. 861, 866 (1974).

2. Of course, the court below was correct in stressing (Pet. App. A5) that freedom of speech is a fundamental liberty, protected by the First Amendment (through the Fourteenth Amendment) from unreasonable or "dubious intrusions" by the States. We believe, however, that the state court's conclusion that the Oklahoma Outdoor Advertising Control Act would be of doubtful constitutionality if applicable to billboards with noncommercial messages is based at least in part on a serious misapplication of this Court's First Amendment precedents.

It is settled that the exercise of free speech rights—whether the message is commercial or noncommercial—may be limited by reasonable time, place, and manner regulation unrelated to the content of the message. *Consolidated Edison* v. *Public Service Comm'n*, No. 79-134 (June 20, 1980), slip op. 4-5; *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). Such regulation is permissible because "various methods of speech, regardless of their content, may frustrate legitimate governmental goals." *Consolidated Edison* v. *Public Service Comm'n*, *supra*, slip op. 5. "Independently of the message * * * convey[ed], the form of [a] communication may be offensive—perhaps because it is too loud or too ugly in a particular setting." Slip op. 3 (Stevens, J., concurring) (footnotes omitted). On the other hand, regulation of methods of speech is reasonable only where it "serve[s] a significant governmental interest and leave[s] ample alternative channels for communication." Slip op. 4-5.

The Oklahoma statute at issue regulates the location of a particular form of mass communication—the billboard. Respondent is free to express any views she wishes on any

subject matter, but she may not do so on a billboard erected within specified areas adjacent to the highways covered by the statute, including areas visible from the main-traveled way of rural highways that are controlled under the Act.[7] This Court has long recognized that outdoor advertising in general, and billboards in particular, pose problems that justify government regulation. See *Packer Corp.* v. *State of Utah*, 285 U.S. 105, 110 (1932); *St. Louis Poster Advertising Co.* v. *City of St. Louis*, 249 U.S. 269, 274 (1919); *Thomas Cusack Co.* v. *City of Chicago*, 242 U.S. 526, 529-530 (1917). Cf. *Fifth Avenue Coach Co.* v. *City of New York*, 221 U.S. 467, 482-483 (1911).[8] Most notably, billboards are visually intrusive, thrust "before the eyes of observers * * * to be seen without the exercise of choice or volition on their part[,]" since, unlike a radio, billboards cannot be "turned off." *Packer Corp.* v. *State of Utah*, *supra*, 285 U.S. at 110 (Brandeis, J.), quoted in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974) (opinion of Blackmun, J.). Where this Court has struck down regulation of visual

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[7]It is possible that under the Oklahoma Act's exemption for on-premise signs describing activities conducted on the property on which such signs are located (Okla. Stat. tit. 69, § 1274(b) (West 1969)), respondent may erect a sign similar to the one concerned here on a showing that the sign is on her residential premises and that activities related to the message on the sign are conducted there. We do not know that respondent's sign, as described in the record, would qualify for the exemption; but as explained below (pages 15-16 & note 12, *infra*), respondent did not claim the exemption and the factual record is deficient with respect to its applicability. Oklahoma's future construction of that exemption could be influenced by federal policies to be determined in rulemaking proceedings by the United States Department of Transportation (see pages 16-17, *infra*).

[8]Indeed, Mr. Justice Douglas took favorable note of the restrictions on billboards imposed by the Highway Beautification Act of 1965, 23 U.S.C. 131 *et seq.*, the statute that induced the enactment of the Oklahoma Act. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 306 (1974) (concurring opinion).

distractions on the highways, it has done so only because the regulation was based on content rather than on the traffic hazards or the intrusions on privacy that the general class of such distractions may impose. *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 212 & n.9, 214-215 (prohibition of the exhibition, by drive-in movie theaters, of films featuring nudity where the screen is visible from the street).

Both the Oklahoma Act and the federal Highway Beautification Act of 1965, on which the Oklahoma Act and other state outdoor advertising statutes are modelled, reflect legislative determinations that control of billboards along highways is essential to the protection of public safety on the highways and, outside of commercial and industrial zones, to the preservation of the natural beauty of the adjoining lands. 23 U.S.C. 131(a); Okla. Stat. tit. 69, § 1271 (West Cum. Supp. 1979-1980). Whatever their message—commercial or noncommercial—billboards pose traffic safety hazards and blight the landscape. Recognizing the legitimacy of these governmental objectives, state supreme courts have almost uniformly rejected First Amendment challenges to billboard regulation. See, *e.g.*, *Metromedia, Inc.* v. *City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), appeal pending, No. 80-195, and cert. pending, No. 80-196; *Washington* v. *Lotze*, 92 Wash. 2d 52, 593 P.2d 811, appeal dismissed for want of a substantial federal question, 444 U.S. 921 (1979); *Newman Signs, Inc.* v. *Hjelle*, 268 N.W. 2d 741 (N.D. 1978), appeal dismissed for want of a substantial federal question, 440 U.S. 901 (1979); *Lubbock Poster Co.* v. *City of Lubbock*, 569 S.W.2d 935 (Tex. Ct. Civ. App. 1978), cert. denied, 444 U.S. 833 (1979); *Stuckey's Stores, Inc.* v. *O'Chesky*, 93 N.M. 312, 600 P.2d 258 (1979), appeal dismissed for want of a substantial federal question, No. 79-1233 (May 12, 1980); *Veterans of Foreign Wars* v. *City of Steamboat*

Springs, 195 Colo. 44, 575 P.2d 835, appeal dismissed for want of a substantial federal question, 439 U.S. 809 (1978); *Suffolk Outdoor Advertising Co.* v. *Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), appeal dismissed for want of a substantial federal question, 439 U.S. 808 (1978); *Donnelly Advertising Corp.* v. *Mayor and City Council of Baltimore*, 279 Md. 660, 667-669, 370 A.2d 1127, 1131-1132 (1977); *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Board*, 369 Mass. 206, 339 N.E.2d 709, 721-722 (1975); *Markham Advertising Co.* v. *State*, 73 Wash.2d 405, 428-429, 439 P.2d 248, 262-263 (1968), appeal dismissed for want of a substantial federal question, 393 U.S. 316 (1969). See also *John Donnelly & Sons* v. *Mallar*, 453 F. Supp. 1272 (D. Me. 1978), appeal pending, No. 79-1575 (1st Cir.). But see *Baldwin* v. *Redwood City*, 540 F. 2d 1360 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977) (city ordinance limiting size and placement of temporary political campaign signs and requiring prior permission to erect such signs violates First Amendment).[9]

Contrary to respondent's suggestion (Br. in Opp. 6), some of the reported decisions rejecting First Amendment

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[9]One of the features of the Redwood City ordinance deemed unconstitutional by the Ninth Circuit was its provision for summary seizure of temporary political campaign signs. *Baldwin* v. *Redwood City*, *supra*, 540 F. 2d at 1373-1374. Under the Oklahoma Act, however, removal of an unlawfully placed sign can occur only after 90 days' notice to the owner of the sign or to the landowner, if the sign owner cannot be identified. Okla. Stat. tit. 69, § 1280(d) (West Cum. Supp. 1979-1980). Under the federal program in which Oklahoma and other states participate, compensation must be paid for the removal of any sign that conformed to state law at the time it was erected but that does not now conform to federal requirements. 23 U.S.C. (& Supp. II) 131(g). The federal government pays 75% of the compensation (*ibid.*), and removal is not mandated by the federal statute if the federal share of compensation is not available for payment. 23 U.S.C. 131(n).

challenges to billboard regulation recognized that the statute under consideration applied to stationary signs generally, without distinction between commercial and noncommercial messages. See, *e.g.*, *Washington* v. *Lotze*, *supra*; *Veterans of Foreign Wars* v. *City of Steamboat Springs*, *supra*; *Donnelly Advertising Corp.* v. *Mayor and City Council of Baltimore*, *supra*. Even more significantly, in two cases which this Court has dismissed for want of a substantial federal question, appellants attacking billboard regulation laws raised the issue of political speech in their jurisdictional statements. *Washington* v. *Lotze*, *supra*; *Suffolk Outdoor Advertising Co.* v. *Hulse*, *supra*.

3. The Oklahoma Supreme Court reached a contrary conclusion with respect to the Oklahoma statute, insofar as it might be construed to apply to noncommercial speech, by erroneously characterizing the regulation of highway billboards as an unlawful "prior restraint" of expression in an appropriate "public forum," permissible only on a showing of "clear and present danger of serious and substantial evil" (Pet. App. A6).

The Oklahoma Act, of course, like any permit scheme, can technically be labelled a prior restraint on free expression, but it possesses none of the essential characteristics of the schemes deemed by this Court to warrant such a label. Unlike the statutes challenged in prior restraint cases decided by this Court, the Oklahoma statute does not create a standardless program vesting substantial discretion in a local official and thereby creating the danger that the official will base his decision on his personal evaluation of the content of a message. See *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553, 555 (1975); *Schneider* v. *State*, 308 U.S. 147, 163-164 (1939). See also *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976) (plurality opinion).

The Oklahoma statute makes it clear where billboards are prohibited and where they are allowed; and the distinction does not turn on subjective criteria.

The state court's ruling that the highway is a "public forum" erroneously equates highways—on which motorists may generally travel at the maximum speed permissible in a state—with city streets, traditionally the scene of picketing, leafleting, parades, and similar activities not well adapted to an environment of high speed vehicular traffic. See *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at 306 (Douglas J., concurring) ("[A] streetcar or bus is plainly not a park or sidewalk or other meeting place * * * any more than is a highway.").[10]

The court's erroneous conclusion that restricting the right to erect billboards near highways constitutes a prior restraint on free expression in a public forum is of more than academic significance; for it led the court to reject (Pet. App. A8) the idea that aesthetic purposes, such as a concern for preserving scenic beauty from the clutter of signs, could serve as even a partial justification for the Oklahoma statute, and it also accounts for the court's refusal (*id.* at A9 n.3) to consider the availability of other channels of communication for respondent's message.

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[10] This is not to say that reasonable restrictions on the location of billboards within urban areas are unconstitutional. See *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941); *Metromedia, Inc.* v. *City of San Diego*, *supra*.

4. While the court acknowledged (Pet. App. A8-A9) the substantiality of traffic safety as a justification for a law restricting particular forms of expression, it declined to accept this rationale for the Oklahoma law because the restriction on highway signs was not absolute. The court thereby ignored the common-sense basis for the distinction between commercial or industrial zones, where signs do not stand apart from the landscape and command attention, and rural areas bordering highways, where the impact of such signs is more substantial. It also ignored the logic of the narrowly drawn distinction between on-premise signs—those describing activities conducted on the property on which the sign is located—and off-premise signs. The former are essential to public convenience and to the owners of establishments that members of the public may have reason to visit. The latter are not. The distinction between on-premise signs and off-premise signs has long been accepted by courts as a reasonable basis for differential regulation.[11] Thus, as Mr. Justice Stevens has noted, "[a] state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere * * *." *Young* v. *American Mini Theatres, Inc., supra*, 427 U.S. at 68 & n.30 (plurality opinion), citing *Markham Advertising Co.* v. *State, supra.*

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[11]See, *e.g.*, *E.B. Elliott Advertising Co.* v. *Metropolitan Dade County*, 425 F. 2d 1141, 1152-1155 (5th Cir.), cert. dismissed, 400 U.S. 805 (1970); *Board of Adjustment* v. *Osage Oil & Transportation, Inc.*, 258 Ark. 91, 522 S.W.2d 836, 837-838, cert. denied and appeal dismissed, 423 U.S. 941 (1975); *Metromedia, Inc.* v. *City of San Diego, supra*; *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 211-212, 193 N.E. 799, 828, appeals dismissed, 296 U.S. 543 (1935), 297 U.S. 725 (1936); *Opinion of the Justices*, 103 N.H. 268, 271, 169 A.2d 762, 764 (1961); *United Advertising Corp.* v. *Raritan*, 11 N.J. 144, 150-151, 93 A.2d 362, 365 (1952) (Brennan, J.).

Perhaps because respondent had not contended that her sign came within the Oklahoma Act's exemption for on-premise signs describing activities conducted on the property where the sign is located, the Oklahoma Supreme Court did not consider whether the exemption vitiates the content-neutral character of the statute.[12] We do not believe that the exemption necessarily creates such problems, because it does not differentiate between types of activities that may be described on signs or accord broader rights to some types of activities. Compare *Carey* v. *Brown*, No. 79-703 (June 20, 1980), slip op. 12-13 n.13.

In order to ensure that the exemption is applied in an impartial manner, the United States Department of Transportation, as part of an on-going assessment of the federal program, intends to conduct a rulemaking

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[12] The Oklahoma statute exempts "[o]n-premise activities signs advertising activities conducted on the property on which they are located, including but not limited to, goods sold, stored, manufactured, processed or mined thereon; services rendered thereon; and entertainment provided thereon." Okla. Stat. tit. 69, § 1274(b) (West 1969). The regulations explaining the exemption (Oklahoma Transportation Commission Rules, Regulations, Policies, and Procedures Adopted Dec. 6, 1976 (Revised Feb. 6, 1980), Art. IX-C, § 4(b)) include provisions that substantially track those issued by the United States Department of Transportation in defining the corresponding federal exemption. 23 C.F.R. 750.709. While the statute and the regulations seem primarily concerned with commercial establishments, their language does not preclude application of the exemption to activities in noncommercial establishments, including residential premises.

The applicability of the exemption to respondent's sign is obscure because the record does not show whether the sign is located on respondent's residential premises; her application for registration of the sign indicates only that the property is owned not by respondent but by "Ross Pile" (Exh. A to Plaintiff's Brief in Opposition to Defendant's Demurrer). Similarly the record does not show whether the sign relates to activities, *e.g.*, meetings, conducted there.

concerning the need for regulations to make it clear that the exemption applies to commercial and noncommercial activities alike and that residential premises may be considered noncommercial establishments. An advance notice of proposed rulemaking will be published in September 1980.

If this Court remands the case to the Oklahoma Supreme Court for clarification of the constitutional basis for its decision, the court below might, on an appropriate motion by petitioner, remand the case to the trial court for the submission of evidence bearing on the exemption question and on the availability of alternative locations for respondent's signs or of other channels of communication. Additionally, the State might be given the opportunity to apply its exemption in the light of the Department of Transportation's rulemaking proceedings. The case would then be appropriate for plenary review by this Court. That is not the situation today, however, both because of the uncertainty of the basis for the decision of the court below and because of the deficiencies in the record.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, vacate the judgment of the Oklahoma Supreme Court, and remand the case for clarification of the question whether the decision is supported by an adequate and independent nonfederal ground.

Respectfully submitted.

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APPENDIX

The current definition of "effective control" in the Highway Beautification Act of 1965, 23 U.S.C. (Supp. II) 131(c), provides:

> Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, or historic or artistic

significance the preservation of which would be consistent with the purposes of this section, and signs, displays, and devices advertising the distribution of nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

The current definition of "effective control" in 23 C.F.R. 750.705 provides:

In order to provide effective control of outdoor advertising, the State must:

(a) Prohibit the erection of new signs other than those which fall under § 750.704(a)(1) through (6);

(b) Assure that signs erected under § 750.704(a)(4) and (5) comply, at a minimum, with size, lighting, and spacing criteria contained in the agreement between the Secretary and the State;

(c) Assure that signs erected under § 750.704(a)(1) comply with the national standards contained in Subpart B, Part 750, Chapter 1, 23 CFR;

(d) Remove illegal signs expeditiously;

(e) Remove nonconforming signs with just compensation within the time period set by 23 U.S.C. 131 (Subpart D, Part 750, Chapter 1, 23 CFR, sets forth policies for the acquisition and compensation for such signs);

(f) Assure that signs erected under § 750.704(a)(6) comply with § 750.710, Landmark Signs, if landmark signs are allowed;

(g) Establish criteria for determining which signs have been erected with the purpose of their message being read from the main-traveled way of an Interstate or primary highway, except where State law makes such criteria unnecessary. Where a sign is erected with the purpose of its message being read from two or more highways, one or more of which is a controlled highway, the more stringent of applicable control requirements will apply;

(h) Develop laws, regulations, and procedures to accomplish the requirements of this subpart;

(i) Establish enforcement procedures sufficient to discover illegally erected or maintained signs shortly after such occurrence and cause their prompt removal; and

(j) Submit regulations and enforcement procedures to FHWA for approval.